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"COOPERATION OR CONFLICT: PROBLEMS AND POTENTIAL IN THE NATIONAL LABOR RELATIONS ACT"

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Few issues have been more problematic than that of employee participation or labor management cooperation. It is championed by some as a solution to meeting the challenge of foreign competition and the malaise of alienated employees, and maligned by others as a means to co-opt or undermine organized labor.[1] I have long supported the movement toward cooperation between organized labor and management -- employees and employers -- as a significant step toward reshaping industrial relations in the attempt to achieve economic democracy in the workplace.[2] In so doing, however, I am fully aware of the dangers posed by cooperative efforts to unions and to employees' free choice. Employers can and have used such efforts as weapons against union organizing or employee concerted action. For this reason, my consideration of cooperative initiatives has always been part of a comprehensive view of needed reform in the national labor laws.

I would like first to discuss with you my overall approach to labor law reform and how my views on employee participation fit within this approach. I would then like to turn to the existing law on employee participation and discuss some problems and possible solutions in that area.

The commitment to a democratic society, genuine and open, with appropriate rights and obligations for all sides, must be at the heart of any reform

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1 The extent of this debate can be understood by referring to Samuel Estreicher, Essay, *Employee Involvement and the "Company Union" Prohibition: A Case for the Partial Repeal of Section 8(a)(2) of the NLRA,* 69 N.Y.U.L. Rev. 125 (1994); Sanford M. Jacoby, Commentaries, *Reflections on Labor Law Reform and the Crisis of American Labor,* 69 Chi.-Kent L. Rev. 219 (1994); Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge,* 12 Indus. Rel. L. J. 233 (1990); Carol A. Glick, Note, *Labor-Management Cooperative Programs: Do They Foster or Frustrate National Labor Policy?,* 7 Hofstra Lab. L. J. 219 (1989); David H. Brody, Note, *The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act,* 41 Vand. L. Rev. 545 (1988); Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for the Repeal of Section 8(a)(2),* 27 B.C. L. Rev. 499 (1986): Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2),* 27 B.C.L. Rev. 499 (1986); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act,* 96 Harv. L. Rev. 1662 (1983); Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice,* 28 Syracuse L. Rev. 809 (1977); Note, *New Standards for Domination and Support Under Section 8(a)(2),* 82 Yale L. J. 510 (1973).

2 William B. Gould IV, *Japan's Reshaping of American Labor Law,* (MIT Press) 1984; and William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law,* (MIT Press) 1993.

of our nation's labor laws. I have proposed a series of reforms in my writings,[3] and in my testimony before the Dunlop Commission,[4] which have attempted to be true to this commitment by fashioning an evenhanded approach with balanced rights and responsibilities for labor, management and employees.[5]

With respect to the rights of employees and unions, I have proposed that Congress reverse the Supreme Court's decision in Lechmere,[6] holding that, in most cases, non-employee union organizers seeking communication with employees for the purpose of organization may be excluded from private property by the employer. As a matter of unfair labor practice law -- the issue posed in Lechmere -- provision should be made for periodic non-employee union organizer access to company property open to the public, and to private property closed to the public once a representation petition has been filed. In addition, the statute should be amended to permit certification of bargaining representatives which obtain supermajorities (60% or 70% or more) on the basis of paid up membership authorization cards. This would contribute significantly to expediting the representation process which currently is subject to delays at many stages, from the conduct of an election to the testing of certification in federal court.

Moreover, in the large majority of disputes which are resolved through the secret ballot process, the statute should be amended so as to allow an election to be conducted prior to a hearing in the interest of furthering a prompt, expeditious resolution of the recognition issue.[7] If disputes about eligibility and the appropriate unit are so numerous that they will determine the outcome of the election, a hearing could be held at that point.

I have also advocated changes in the duty to bargain including the imposition of first-contract arbitration in some circumstances and the imposition of a duty to bargain over any policy -- including a decision to partially close an operation -- which arguably affects the conditions of employment. With regard to the question of successorship, I have proposed that Congress reverse Supreme

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3 *See e.g. Agenda for Reform, supra* note \2\, at 63-203.

4 *See* Gould, "Statement before the Commission on the Future of Worker-Management Relations", Bureau of National Affairs, Daily Labor Report, No. 188 September 30, 1994.

5 Gould, "Labor Law and Policy in the '90s: The Role of the National Labor Relations Board" speech before the Ninth Annual Rhode Island Conference on Labor-Management Relations, October 3, 1994, Providence, Rhode Island.

6 112 S. Ct. 841 (1992).

7 I voted with a unanimous Board to require some form of hearing prior to the election under the statute as written. *See* Angelica Healthcare Services Group Inc., 315 NLRB 1320 (1995).

Court authority, explicitly establish that the number of employees hired is irrelevant to the definition of successorship, and impose a collective bargaining agreement upon the successor operation and a duty to bargain about appropriate modifications. Penultimately, I have proposed that Congress overrule the Supreme Court's decision in NLRB v. Truitt,[8] holding that management has a duty to disclose financial information only when it pleads an inability to pay. The rule should be that employees have the maximum amount of information available which might arguably affect the employer's capability to offer wages and conditions of employment at the bargaining table.

And, of course, I am of the view that employers should be precluded from permanently replacing economic strikers. This is why I support President Clinton's Executive Order 12954, 60 Fed. Reg. 13023 (March 8, 1995) applicable to government contractors.

Concerning the rights of employers, I have proposed that the Board no longer attempt to regulate employer speech in representation elections. Because it is virtually impossible to determine the precise impact of campaign propaganda on employees in many circumstances, I have recommended that the Board not use its resources to analyze such propaganda to determine whether it constitutes coercion, threats, or unlawful inducements designed to secure "no" votes from employees. For the same reasons, I have also recommended that the Board not attempt to regulate benefits in the representation context. In both cases, I believe that involvement by the Board can be counterproductive because of the litigation and attendant delay to the representation process. But both sides should have access to employees to present their views fully at the workplace.

With respect to economic pressure, I have advocated that Congress overrule the Supreme Court's decision in Buffalo Forge Co. v. United Steelworkers,[9] precluding employers from obtaining injunctions against a union's violation of a no-strike clause where the violation is a sympathy strike rather than one which arises out of the alleged violation of the collective bargaining agreement. In my view, the no-strike pledge is a vital part of the labor agreement from the employer's perspective and the employer ought to be able to get its side of the bargain through the most effective means available regardless of the reasons the union has reneged on its promise not to strike. Similarly, I have proposed that the law be changed to require a strike ballot so as to induce employees to think more carefully before engaging in a strike. And unauthorized strikes should be regarded as unprotected activity under the Act.[10]

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8 76 S. Ct. 753 (1956).

9 428 U.S. 397 (1976).

10 William B. Gould IV, *The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act,* 52 Cornell Law Quarterly 672 (1967).

These reforms are based on the premise that full industrial democracy requires unimpeded dialogue between employers, unions, and employees where there is full disclosure of necessary information, reasonable access to engage in dialogue, the obligation for all sides to seriously discuss all matters affecting employment conditions, and the obligation to abide by the bargains that are struck as a result of such a process. Consistent with this approach, I am of the view that the law not hinder communication between employers and employees in both the union and non-union setting. The statute should allow employees and employers to communicate and participate with one another through giving information and sharing in decision-making in committees so long as the employee representatives are not imposed by the employer, the employer does not totally control the structure and operation of the committee, and the committee has not been created in response to union organizational campaigns.

The thrust of all the reforms I have advocated is to modify the law to reflect changing social realities and to ensure that full democracy reach the workplace. The movement toward cooperation is the centerpiece of any such attempt at reform because it most sharply embodies a changed perception of relationships in the workplace. The economic dislocation of the 1970s and 1980s caused by the emergence of a global economy and the rise of fierce foreign competition for American industries has forced labor and management to rethink their traditional roles. This has led to the reduction or broad banding of job classifications, greater employee involvement in and understanding of their jobs, and greater employee participation in decisions concerning the work they do.

This attempt to reshape the relationship between labor and management directly opposes the traditional American model of conflict where the parties are considered adversaries with antagonistic interests. A substantial percentage of the interpretations of the National Labor Relations Act since its enactment in 1935 have been based on this model of conflict.[11] The perceived clash between cooperative efforts and labor laws based on an adversarial relationship has given rise to fears that genuine employee participation programs are in legal jeopardy. Particularly, it has been argued by some that the Board's decision in Electromation,[12] chills all such programs.[13]

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11 Gould, *Agenda for Reform, supra* note \2\, at 122.

12 309 NLRB 990 (1992).

13 *See e.g.* John S. Lapham, Note, *Enhancing Employee Productivity after Electromation and Du Pont,* 45 Wash. U. J. Urb. & Contemp. L. 255 (1994); Quality Circle Busters, Wall. St. J., June 9, 1993, at A12; Steven I. Locke, Note, *Keeping Sections 2(5) and 8(a)(2) of the NLRA Intact: A Fresh Look at Worker Participation Committees Through Electromation, Inc.,* 10 Hofstra Lab. L. J. 375 (1992). *But See* Michael S. Albright, *The Legality of Employee Participation Programs Following the*

Is there an unavoidable contradiction between labor-management cooperation and the National Labor Relations Act? Or does the Act provide some latitude for the existence of lawful cooperative efforts? These are some of the questions I would now like to explore with a view toward answering some of them and suggesting possible answers for others.

First, there is the question of the Board's decision in Electromation. Any fears focused on that decision are relatively insignificant. Electromation poses no real danger to cooperative initiatives.

At the outset, it should be understood that the participation program at issue in Electromation was not established in response to the pressure of foreign competition or out of a desire to improve the quality of work-life or to create a more productive business. In this regard, it clearly was not the type of program which those who support the movement toward cooperation seek to protect.

Instead, in Electromation the company established its program of employee action committees in response to expressions of employee dissatisfaction with unilateral changes in its attendance bonus policy and annual wage increase. After the changes had been announced, the employer received a petition signed by 68 employees protesting the changes. Meetings with employees convinced the employer that it had serious problems with its employees. The employer decided that the problems would best be resolved by involving the employees in the decision-making process. Accordingly, the employer created action committees and gave the employees the choice of participating in them or accepting the status quo. The employer defined and limited the subject matter to be covered by each committee and decided how many members each committee would have.

In contrast to many employee participation programs in union and non-union settings, Electromation created the committees solely for the purpose of deciding certain conditions of employment and permitted employee participation in the decision-making only on terms unilaterally set by it. For that reason, the Board's decision in Electromation is a narrow one. The evidence in the case unquestionably showed that the committees were functioning as labor

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NLRB's Electromation, Inc. Decision, 1993 Det. C. L. Rev. 1035; Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis,* 61 Geo. Wash. L. Rev. 1812 (1993); and Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?,* 69 Wash. L. Rev. 331 (1994).

organizations within the meaning of Section 2(5) of the Act[14] and that the employer dominated and interfered with the formation and administration of the committees in violation of Section 8(a)(2) of the Act.[15]

With respect to the finding of labor organization status, the Board found that the record overwhelmingly demonstrated that the purpose of the committees, which were organizations in which employees participated, was solely "to address employees' disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals. This is the essence of 'dealing with' within the meaning of Section 2(5). . . ."[16] This is the part of our legal framework which is most flawed inasmuch as any decision of corporate policy inevitably affects some aspect of the employment relationship.

Regarding the domination in the formation and administration of the committees, the Board emphasized that the employer created the committees and imposed them on the employees without regard to the employees' wishes. When the employees negatively responded to the creation of the committees, the employer gave them the ultimatum of participating in the committees or simply accepting the unilateral changes it had made. The employer also maintained total control of the subject matter to be covered and the number of committee members. It dictated that an employee could serve on only one committee and appointed management representatives as facilitators. In these circumstances, the Board found domination and interference.

Putting aside the precise rationale employed in Electromation -- a matter which I have not yet had the opportunity to address in any of our decisions -- the Board's decision properly precludes the type of domination involved there which

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14 Sec. 2(5) defines a "labor organization" as follows:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

15 Section 8(a)(2) provides that it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

16 Electromation, Inc., 309 NLRB at 997.

allowed no freedom of choice for the employees in any aspect of the process. The finding of unlawful conduct in Electromation expressly was limited to the circumstances presented and in no way suggests that a similar finding would be made under different circumstances.

The Court of Appeals for the Seventh Circuit also stressed the limited reach of the Board's decision in its opinion enforcing Electromation. Said the court:

> We emphasize that our reasoning and ruling in this case is limited to the action committees which are at issue here. It is clear that a finding of a Section 8(a)(2) and (1) violation in this case does not foreclose the lawful use of legitimate employee participation organizations, especially those which are independent, which do not function in a representational capacity, and which focus solely on increasing company productivity, efficiency and quality control in appropriate settings.[17]

While Electromation does not threaten the existence of cooperative efforts, the question still remains as to how such genuine efforts will stand up to an application of Section 8(a)(2) in an appropriate case. There are two parts to the legal issues involved in such an encounter. The first of the issues is whether the entity is a "labor organization" within the meaning of Section 2(5); the second is whether the employer has dominated or interfered with the formation and administration of the entity or unlawfully assisted it under Section 8(a)(2). A few Board decisions have dealt with these issues and give some indication of what the future may hold for cooperative efforts under the National Labor Relations Act.

Regarding the issue of whether an entity is a labor organization, the most significant inquiry is whether the entity exists, at least in part, for the purpose of "dealing with" the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The Supreme Court interpreted this term very broadly. In NLRB v. Cabot Carbon Co.,[18] it concluded that "dealing with" was broader than the term "collective bargaining" and applied to situations where proposals were made to management without contemplating the negotiation of a collective bargaining agreement.

Despite the breadth of the Court's holding in Cabot Carbon, the Board has, in a few instances, found that employee participation entities do not deal with the

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17 Electromation v. NLRB, 35 F.3d 1148, 1157 (7th Cir. 1994).

18 360 U.S. 203 (1959).

employer and are not, therefore, labor organizations under Section 2(5). In General Foods, Inc.,[19] the Board found that an employer-created job enrichment program composed of work teams was not a labor organization. Every employee in the plant was on a team and each team, through the consensus of its numbers, made job assignments, scheduled overtime and assigned job rotations. The Administrative Law Judge, with Board approval, found that the teams were essentially "committees of the whole" to which the employer had fully delegated authority to act on certain conditions of employment. As such, there was no dealing with the employer and, hence, the teams were not labor organizations.

Similar conclusions were made in two cases involving grievance committees established by the employer. In John Ascuaga's Nugget,[20] and Mercy Memorial Hospital,[21] the Board found that the grievance committees did not deal with management. Instead, management fully delegated the managerial function of adjusting grievances to the committees.

These decisions are quite limited in scope. Full delegation of a managerial or adjudicatory function is required. It would be safe to assume that many employee involvement programs do not operate by committees of the whole or autonomous work group or involve such total delegation of authority and function. The General Food, John Ascuaga's Nugget, and Mercy Memorial Hospital cases are, therefore of limited value as models for the Act's potential to accommodate the changing industrial reality embodied in the rise of cooperative programs.

The Board's more recent decision in E.I. du Pont de Nemours & Co.,[22] suggested that there were other forms of participation that would not be found to have labor organization status. In that case which involved an established labor-management relationship, the Board defined the term "dealing with" as a bilateral process where a group of employees develop a pattern or practice of making proposals to management which management accepts or rejects by word or deed. The Board stated that isolated instances of ad hoc proposals to management could not constitute dealing. Similarly, an employee group which has the purpose of sharing information with the employer or developing ideas and makes no proposals to management would not be engaged in dealing with management. Finally, the Board asserted that there would be no dealing with management if the participation committees were governed by majority decision-making, management representatives were in the minority, and the committee

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19 231 NLRB 1232 (1977).

20 230 NLRB 275 (1977).

21 231 NLRB 1108 (1977).

22 311 NLRB 88 (1993).

had the power to decide matters for itself, rather than to make proposals to management.

Again, these examples are of limited value to those attempting to steer a lawful course for cooperative efforts. Such efforts, by definition, are not composed of isolated instances and ad hoc actions as they relate to employment conditions. They are instead, programs which contemplate the establishment of a pattern of new interactions and relationships in the work place. For the same reason, these efforts are not likely to be confined to sharing information and developing ideas without any proposals for change. At the other end of the continuum, it is also likely that not all such efforts to reshape relationships in the work place would go so far as to give full and final decision-making power to an employee participation group where management was in the minority.

There is more fertile ground for the possibility of the lawful existence of employee participation programs in the second legal issue involved in determining whether a violation of Section 8(a)(2) has been established; i.e., whether the employer has dominated or interfered with the formation or administration of a labor organization or has given assistance to it. If employee participation programs allow sufficient independence and exercise of free choice, they may avoid violation of Section 8(a)(2).

In Electromation, the Board observed that the domination of formation and administration of a labor organization is established when the organization has been created by management, depends upon management for its continued existence, and when management has essentially determined its structure and function. Domination is not established when the formation and structure of the organization is determined by employees. This will be the case even when the employer has the potential ability to influence the structure or effectiveness of the organization.[23] The critical factor, then, is the degree and nature of employer involvement in the organization. Said the Board in Electromation: "[W]here the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate. . . ."[24]

This leaves some latitude for cooperative relationships to operate within the bounds of Section 8(a)(2). Even if an employee participation group is a labor

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23 Electromation, 309 NLRB at 995-96. *See* Duquesne University, 198 NLRB 891, 892-893 (1972), cited as an example of a case where no violation was found when the organization was formed and structured by employees and the employer had the potential ability to influence the structure of the organization.

24 *Id.* at 996.

organization which deals with management, there will be no violation if the organization is initiated by employees and/or has independence from the employer. However, the degree of latitude afforded here may be more illusory than real. The finding of a lawful organization under this approach turns on the determination of whether the organization is sufficiently free of employer control and support. Reasonable minds may differ on this determination.

Indeed, the Board and the Seventh Circuit differed over such a determination in Chicago Rawhide Mfg. v. NLRB.[25] In that case, employees initiated a meeting with the employer and proposed a procedure for allowing employee involvement in the handling of grievances. The employer permitted elections and committee meetings to be held on company property during working hours, and made contributions to the recreation committee. The Board found these actions by the employer to be unlawful assistance and a means of domination. The Seventh Circuit disagreed.

The court denied enforcement of the Board's order in Chicago Rawhide on the ground that the Board had failed to distinguish lawful cooperation from unlawful support. The court stated:

> Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their representative in carrying out their independent intention.[26]

The court focused on the intention of the employees and whether they freely chose to participate in the committee. Any support or assistance from the employer had to be judged against the intentions of the employees. The court held that a subjective test based on employees' perceptions must be used. The court stated:

> The Board is quite correct in pointing out employer assistance may be, and often has been, a means of domination. Assistance or cooperation does not always mean domination, however, and the Board must prove that employer assistance is actually creating company control over the [labor organization] before it has established a violation of Section 8(a)(2). "The test of whether an employee organization is employer controlled is not an objective one but rather subjective

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25 221 F.2d 165 (7th Cir. 1955).

26 221 F.2d at 167.

> from the standpoint of the employees." NLRB v. Sharples Chemicals, Inc., 6th Cir. 209 F.2d 645, 652; NLRB v. Wemyss, 9th Cir. 212 F.2d 465.[27]

The court clarified its reference to a subjective test in its recent opinion enforcing the Board's order in Electromation. It asserted that, while it is important to take the subjective wishes of employees into consideration, the interpretation of Section 8(a)(2) cannot be limited solely to the consideration of employees' subjective will and cannot require a finding of employee dissatisfaction with an organization. To do so would run afoul of the Supreme Court's holding in NLRB v. Newport News, Shipbuilding & Dry Dock Co.[28] In that case, the Court held that an organization's success in obviating serious labor disputes and the employer's incidental good faith interference in the administration of the organization were immaterial to the test of independence. Thus, the court clearly rejected conclusive reliance on such factors as employer motivation and employee satisfaction with the organization.

The Seventh Circuit summarized the test for domination as follows:

> The Supreme Court has explained that domination of a labor organization exists where the employer controls the form and structure of a labor organization such that the employees are deprived of complete freedom and independence of action as guaranteed to them by Section 7 of the Act, and that the principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions.[29]

The court and the Board, which had parted company in Chicago Rawhide, came together in Electromation. The critical differences between these cases were that in Chicago Rawhide the employees initiated the formation of the committee, the committee met outside of the presence of management, and management representatives did not determine the subject matters to be considered, select the members of the committee, or exercise a veto over what recommendations would be submitted to higher management. The exact opposite was the case in Electromation.

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27 *Id.* at 168.

28 308 U.S. 241, 249 (1939).

29 Electromation, 35 F.3d at 1170.

I have previously stated that I believe the Seventh Circuit in Chicago Rawhide had the appropriate view of the relationship between labor and management in a cooperative environment.[30] I also agree with the Board and the Seventh Circuit that the law properly precludes the kind of domination involved in Electromation.[31] In my view, therefore, an employee-initiated cooperative effort like that at issue in Chicago Rawhide does not come into conflict with the National Labor Relations Act.

The possibility for the lawful existence of such efforts, however, does not fully answer the question whether the cooperative movement is on a collision course with the national labor laws. Since the early 1980s, the initiative for cooperative relationships in the workplace has been forged by employers, particularly in the non-union sector.[32] This means that many of the cooperative programs are created by management. The impetus for them does not come from employees. These cooperative efforts, therefore, do not fall within the Chicago Rawhide model. They might still be found lawful if the employer does little more than create the committees and does not control substantial aspects of the structure, functioning, or subject matter of the committees. Such committees could, perhaps, be considered the employer's creation but not the employer's creature.

Even if the employer creates such committees free of its control, there may still be a conflict with Section 8(a)(2) if the employer's action is designed to thwart unionism. I have previously stated that I would find a conflict in such circumstances. I have said that the inference that it is the employer's intent to thwart unionism should be established where the employer creates cooperative efforts at the time it becomes aware of a union organizational campaign.[33]

Whether all genuine cooperative efforts in union or non-union settings can exist under the National Labor Relations Act is not clear at this time. A number of cases pending at the Board may bring more clarity to this question. These cases show employee participation committees arising in different contexts. In Vons Grocery, Cases 21-CA-28816 et al., the employees were represented by a union. The employer created a quality circle group of drivers to identify and solve work problems. The group usually numbered about 8 drivers who volunteered to participate and were free to direct the group in any direction they chose. The group influenced the purchasing of new types of jacks, solved parking problems, installed a safety dock chain system, and the like. It also developed a proposal regarding the drivers' right to wear shorts while on duty

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30 Gould, *Agenda for Reform, supra* note \2\, at 140.

31 *Id.*

32 *Id.* at 121.

33 *Id.* at 140.

and a proposal to change the discipline policy on driver accidents. The group presented these proposals at a meeting where it invited representatives of management and the union. Subsequently, the union placed both proposals on the bargaining table and ultimately won agreement on the shorts policy but not on the accident policy.

The Administrative Law Judge found that the quality circle group was not a labor organization under Section 2 (5) and that the employer, therefore, had not unlawfully dominated it under Section 8(a)(2). He found that although the group had strayed into mandatory subjects of bargaining with its proposals on dress and accident policy, the union pursued both proposals in negotiations and, therefore, waived any complaint about the group's activities with regard to the proposals. The judge also found there was insufficient proof that a purpose of the group was to deal with management on such matters as conditions of employment because the union, with the group's approval, has placed stewards at the group meetings who monitor the group to be certain that it does not go into areas that are within the union's domain. The General Counsel has filed exceptions to this ruling.

In Dillon Stores, Case 17-CA-16811, the employer instituted employee committees in its various retail grocery stores. The committees consist of two employees from each store who are elected for 1-year terms. At quarterly meetings, the committees present their area manager with issues raised by employees such as new equipment, improved air-conditioning, and full payment for unused sick leave. The employer has acted on some proposals or requests and rejected others. Although it appears that the employees are represented by a union, there is no evidence of any interaction between the committees and the union. The ALJ found that the committees were Section 8(2)(5) labor organizations and that the employer dominated them in violation of Section 8(a)(2). The employer has filed exceptions to this ruling.

The Keeler Brass case, Case 7-CA-32185, involves an employer-created committee to deal with grievances. The employees were not represented by a union and there was no ongoing union organizing campaign. There also is no evidence that the employer created the committee in response to concerted action by employees. The employer established the committee and designated the number of employees to participate in it. The committee functioned as the third step in a grievance procedure. The ALJ found that the committee was not a Section 2(5) labor organization because by considering the committee's recommendations on grievances, the employer was not "dealing with" the committee on wages, hours or other terms and conditions of employment, but was simply considering recommendations to changes in grievances. The General Counsel has filed exceptions to the judges' dismissal of the complaint.

In Stoody Company, Case 26-CA-15425, the employer established an employee handbook committee during the course of a union organizing campaign. The employer announced to employees that the committee was not to deal with wages , benefits, or working conditions, but was to gather information about areas in the handbook that were inconsistent with current practices or that were misunderstood by employees. At its first meeting, the committee did not confine itself to the announced purpose. Employees raised issues regarding vacation notification time, sick leave and personal time. The committee did not meet again because the union filed charges alleging the employer violated Section 8(a)(2) in connection with the committee. The ALJ found that the committee was a Section 2(5) labor organization because despite its announced purpose, it dealt with the employer on matters involving wages, hours, and conditions of employment. He concluded that although the committee met only once, there was no evidence that it would not have continued in the same vein, had no charges been filed. The judge also concluded that the employer dominated the committee because it controlled the formation of it, the election of its members, and the conduct of its meetings. The employer has filed exceptions to the judge's rulings.

The Webcor Packaging case, Case 7-CA-31809, also involves the establishment of an employee committee during a union organizing campaign. The employer, seeking more employee involvement, established a plant council with 5 employees and 3 members of management. Employees chose the employee members. The decisions of the council were taken by simple majority vote, although the members always tried to reach consensus. The council was involved with the development of plant policies, the creation of a grievance procedure, and with wages and benefits. The judge found that the council was a Section 2(5) labor organization. He also found that the council was dominated by the employer because the employer created it, and determined its structure and function and continued existence. The judge found a violation of Section 8(a)(2) under Electromation even though the council was not created out of any antiunion motive and regardless of whether the employees were pleased to have it. The employer has filed exceptions to the judge's rulings.

Whatever future decisions of the Board may allow or preclude, certainly, the Electromation decision does not preclude cooperative initiatives. However, the Seventh Circuit, in its opinion enforcing the Board's decision in Electromation, made the following observation:

> There are some serious policy arguments that suggest that today's evolving industrial environment may require reconsideration of Section 8(a)(2) of the Act, or at least

its interpretation and application to certain modern employee organizations.[34]

I have made similar observations in past writings.[35] In agreement with the Seventh Circuit, I do not believe that Electromation brought such policy questions into issue. Consequently, those questions remain to be answered.

In the end, it may be necessary to amend the National Labor Relations Act to permit genuine cooperative initiatives to survive. My judgment is that reform in this area -- and reform relating to other aspects of the National Labor Relations Act -- is desirable and good policy for our country. We ought to promote and foster genuine dialogue in the workplace in a balanced fashion. Employees and employers should be encouraged -- not compelled through statutory work councils and the like -- to communicate on conditions of employment as well as sales, product design, and productivity problems.

The same approach should be applied to the duty to bargain applicable to labor and management. All that arguably affects employment conditions should be addressed at bargaining table. This is the successful lesson of numerous bargaining relationships like Saturn and NUMMI in Freemont, California which have effectively promoted cooperative relationships.

The Act should not be amended in the manner proposed by the current Teamwork for Employers and Management Act.[36] There is no assurance in the proposed amendment that employee free choice will be honored. The amendment simply limits lawful forms of participation to those which do not have or seek the authority to negotiate collective bargaining agreements with the employer or to amend existing collective bargaining agreements.

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34 Electromation, 35 F.3d at 1157.

35 Gould, *Agenda for Reform*, *supra* note \2\, at 136-147.

36 On January 30, 1995, Senator Kassebaum and Representative Gunderson introduced a bill in the Senate and House, respectively, with the stated purpose: "To permit labor management cooperative efforts that improve America's economic competitiveness to continue to thrive, and for other purposes." The bill proposes an amendment to Section 8(a)(2) which would permit employer assistance and participation in any entity in which employees participate to address matters of mutual interest and which does not seek to negotiate collective-bargaining agreements or to amend existing agreements. The proposed "Findings" supporting the amendment contains the assertion that "employee involvement is currently threatened by interpretations of the prohibition against employer-dominated 'company unions.'"

As long as the entity does not attempt to engage in collective bargaining, it would be lawful under the proposed amendment for the employer to fully control all aspects of the entity, including its structure, method of functioning and subject matter. This would be inconsistent with what I think is finest in genuine cooperative efforts -- the movement toward full industrial democracy.

The central thrust of any attempt to change the Act should be the honoring of employee free choice. Any amendment to Section 8(a)(2) should be limited to eliminating the barriers to cooperation and promoting communication when there is evidence that the employees freely and independently desire it regardless of who initiated the idea. This might take the form of a proviso to Section 2(5) which would exclude from the proscriptions of Section 8(a)(2) employee committees or groups, voluntarily joined or created by employees, which are not created in response to union organizing, not inhibited in their administration by the employer and which have some representatives chosen by the employees.

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